



ILLINOIS COMMERCE COMMISSION

May 4, 2004

Ms. Ann DeBortoli
Assistant Vice President
Peoples Energy Services Corporation
205 North Michigan Avenue, Suite 4216
Chicago, IL 60601

Re: Annual ARES Continuing Compliance Reporting Requirements

Dear Ms. DeBortoli:

The annual reporting and certification requirements for Illinois alternative retail electric suppliers ("ARES") are outlined at 83 Ill. Adm. Code Part 451 Subpart H ("Subpart H"). The legal staff of the Illinois Commerce Commission ("Commission") is in the process of reviewing the letter you sent to the Commission's Chief Clerk on January 23, 2004, citing Subpart H. The purpose of this letter is to request clarification concerning your company's ongoing compliance with Section 16-115(d)(5) of the Public Utilities Act, which is often referred to as the "reciprocity requirement."

We would like to offer you the opportunity to provide written comment on your ongoing certification in terms of several decisions of the Commission that have been made in recent months, specifically including orders in Docket Nos. 01-0174 (Order on Remand, September 9, 2003); 02-0740 (Order on Rehearing, June 26, 2003); and 04-0118 (Order, April 21, 2004) that pertain to compliance with Section 16-115(d)(5) of the Public Utilities Act. Each of these documents is available on the Commission's web site (<http://www.icc.state.il.us/home.aspx>); click on e-Docket, Browse a Docket (enter the docket number in the dialog box), Documents, and scroll to the relevant Commission Order. If your company wishes to cite or address any additional decisions of the Commission or any other forum, we will consider this information as well.

Ex. D

Please provide your responses by June 4, 2004. If you have any questions with regard to the information requests listed in this letter please contact Dick Favoriti of the Office of General Counsel at (312) 793-1558, and he and/or I will do our best to respond to your questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patrick Foster".

Patrick Foster
Office Of General Counsel

cc: Richard Favoriti
Illinois Commerce Commission, Office of General Counsel

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June 4, 2004

Mr. Patrick Foster
Illinois Commerce Commission
Office of General Counsel
527 E. Capitol Ave.
Springfield, Illinois 62701

Re: ARES Compliance Requirements

Dear Mr. Foster:

This letter is in response to your May 4, 2004 letter to Ms. Ann DeBortoli of Peoples Energy Services Corporation ("PE Services") requesting comment on ongoing compliance with Section 16-115(d)(5) of the Public Utilities Act (the "reciprocity requirement"). 220 ILCS 5/16-115(d).¹ There has been no change in PE Services' circumstances, nor in applicable law. PE Services continues to meet the requirements in the Public Utilities Act and the Illinois Commerce Commission's ("Commission") rules.

¹ Section 16-115(d) states, in relevant part:

(d) The Commission shall grant the application for a certificate of service authority if it makes the findings set forth in this subsection based on the verified application and such other information as the applicant may submit:

...

(5) That if the applicant, its corporate affiliates or the applicant's principal source of electricity (to the extent such source is known at the time of the application) owns or controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area to which electric power and energy can be physically and economically delivered by the electric utility or utilities in whose service area or areas the proposed service will be offered, the applicant, its corporate affiliates or principal source of electricity, as the case may be, provides delivery services to the electric utility or utilities in whose service area or areas the proposed service will be offered that are reasonably comparable to those offered by the electric utility, and provided further, that the applicant agrees to certify annually to the Commission that it is continuing to provide such delivery services and that it has not knowingly assisted any person or entity to avoid the requirements of this Section. For purposes of this subparagraph, "principal source of electricity" shall mean a single source that supplies at least 65% of the applicant's electric power and energy, and the purchase of transmission and distribution services pursuant to a filed tariff under the jurisdiction of the Federal Energy Regulatory Commission or a state public utility commission shall not constitute control of access to the provider's transmission and distribution facilities; (emphasis added)

None of PE Services, its affiliates and its principal source of electricity are electric utilities. The reciprocity requirement is satisfied because no plausible reading of Section 16-115(d)(5) imposes such a requirement. The decisions cited in your letter are not relevant to PE Services because they focus on the application of clauses in Section 16-115(d)(5) and the information needed to apply those clauses.

June 27 Staff Memorandum and IBEW Decision

In a memorandum dated June 27, 2003 ("Staff report resulting from annual reporting process"), which Staff sent the Commission members, the Staff described two possible interpretations of the reciprocity requirement. The Staff report was in response to an Illinois appellate court's decision in IBEW v. The Illinois Commerce Commission and WPS Energy Services, Inc., 331 Ill. App. 3rd 607 (5th Dist. 2002) ("IBEW"). The IBEW Court concluded that Section 16-115(d)(5) imposed three distinct requirements. Those three requirements are focused on: (1) what an applicant needs to show to satisfy the "physically and economically delivered" clause; (2) the "reasonably comparable" clause; and (3) annual certification.

The Staff, under one interpretation of IBEW, concluded that an Alternative Retail Electric Supplier ("ARES") having no electric public utility affiliate was not subject to the IBEW test because it would not be in a position to "take unreasonable advantage of the investments made by the formerly regulated industry." (quoting from page 3 of memorandum, which is quoting from Section 16-101A(c) of the Public Utilities Act) This is a reasonable interpretation of IBEW, as discussed below. The Staff's second interpretation is that an applicant, its affiliate or principal source of electricity (hereafter, the "applicant") must be an electric utility. However, that second interpretation ignores the fact that the first part of the IBEW analysis is focused on whether an applicant's facilities are able to physically and economically deliver electric power and energy. When there are no facilities dedicated to the public use at issue, then the question of physically and economically delivering power is moot and the second part of the analysis (reasonable comparability of delivery services) is likewise moot. An interpretation that an applicant must own facilities for the public use effectively establishes a fourth condition to satisfying Section 16-115(d)(5), viz., that before determining if the three parts of Section 16-115(d)(5) are met, the applicant must be an electric utility. That predicate condition is not found in Section 16-115(d)(5), nor in the IBEW decision.

Specifically, the IBEW court was faced with conflicting interpretations about what Section 16-115(d)(5) required. The Court rejected what it said was the Commission's interpretation that only required "an applicant to certify that power and energy *cannot* be physically and economically delivered by an Illinois utility in whose service area or areas the applicant proposes to provide service." (emphasis added) Instead, the Court determined that, an applicant making a showing that Illinois utilities cannot physically and economically deliver power, has not satisfied the "physically and economically

delivered" clause. The Court, however, was not imposing a requirement that an applicant be an electric utility. The Court was determining what such an applicant must show to satisfy the "physically and economically delivered" clause.

Illinois Commerce Commission Decisions

The three decisions cited in your letter are not inconsistent with PE Services' ARES certification.²

First, the issue in Blackhawk was whether the applicant met the "reasonably comparable" requirement. Blackhawk had electric utility affiliates and, thus, triggered the requirements that it address the "physically and economically delivered" clause and the "reasonably comparable" clause. These clauses do not come into play in analyzing PE Services' continuing compliance with the reciprocity requirement.

Second, the issue in MGES, as in Blackhawk, was the "reasonably comparable" clause.

Third, the Commission was forced to find that The Lower Electric, LLC ("Lower Electric") failed to meet the reciprocity requirement because Lower Electric failed to respond adequately to requests for information and provide information needed for the Commission's analysis. Notably, the Commission further stated that it "believes that power marketers such as Lower Electric plausibly fit into the ARES certification process as envisioned by the IBEW court." Lower Electric's application was deficient, and the Commission was unable to complete its analysis. Consequently, Lower Electric provides no substantive guidance.

For the foregoing reasons, PE Services continues to satisfy the reciprocity requirement.

Very truly yours,
/S/ MARY KLYASHEFF
Mary Klyasheff
An Attorney for
Peoples Energy Services Corporation

² Blackhawk Energy Services, LLC, Docket 01-0174, Order on Remand, September 9, 2003 (Blackhawk); Midwest Generation Energy Services, LLC, Docket 02-0740, Order on Rehearing (June 26, 2003) (MGES); The Lower Electric, LLC, Docket 04-0118, Order, April 24, 2004 (Lower Electric).